(3)

84-560

No. _____

Office - Supreme Court, U.S.
FILED
NOV 1 1984
STEVAS.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WALTER PODROG AND J. FRANK MANNING
Class Representatives, Grand Junction Bondholder Class
(Fabricating, Inc.)

Petitioners,

v.

WARING, COX, JAMES, SKLAR & ALLEN,
Attorneys, a partnership,

Respondents.

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

LEO BEARMAN, JR.
2000 First Tennessee Building
Memphis, Tennessee 38103
(901) 526-2000
Attorney for Respondents

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

13 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI	1
I. The Federal Question Sought To Be Raised Through This Petition Was Not Properly Raised At Any Level In The Proceedings In The State Courts	1
II. The Issues Raised In This Petition For A Writ Of Certiorari Do Not Constitute An Important Question Of Federal Law Which Should Be Settled By This Court	5
CONCLUSION	6

TABLE OF AUTHORITIES

Page

CONSTITUTION

United States Constitution, Fourteenth Amendment 5

FEDERAL STATUTES

28 U.S.C. §1257 ..... 3, 4

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 17.1(c) 5, 6

Rule 21.1(h) 4

STATE STATUTES

Tennessee Code Annotated §28-304 ..... 1, 2

Tennessee Code Annotated §29-14-107(b) 2

Tennessee Rules of Civil Procedure, Rule 24.04 2

Tennessee Rules of Appellate Procedure, Rule 32(a) 3

UNITED STATES SUPREME COURT CASES

Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969) 3, 4

Carter v. Hartenstein, 401 U.S. 901, 91 S.Ct. 868, 27 L.Ed.2d 800 (1971) 5

Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) 4, 5

Woodward v. Burham City Hospital, 449 U.S. 807, 101 S.Ct. 54, 66 L.Ed.2d 11 (1980) 6

Table of Authorities Continued

Page

OTHER CASES

Carter v. Hartenstein, 248 Ark.1172, 455 S.W.2d 918 (1970) 5

Cummings v. Shipp, 156 Tenn. 595, 3 S.W.2d 1062 (1928) 3

Woodward v. Burham City Hospital, 79 Ill.2d 295, 402 N.E.2d 560 (1979) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WALTER PODROG AND J. FRANK MANNING
Class Representatives, Grand Junction Bondholder Class
(Fabricating, Inc.)

Petitioners,

v.

WARING, COX, JAMES, SKLAR & ALLEN,
Attorneys, a partnership,

Respondents.

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I. The Federal Question Sought To Be Raised Through This Petition Was Not Properly Raised At Any Level In The Proceedings In The State Courts.

Petitioners raise as the federal question sought to be reviewed the constitutionality of the application of Tennessee Code Annotated §28-304 (now Tennessee Code Annotated §28-3-104) to the facts of this cause. That question has never been properly raised at any stage of the proceedings by Petitioners. It cannot, therefore, now be raised in this Petition.

Although your Respondents cited that specific statute of limitations in question (Tennessee Code Annotated §28-304) as a defense in its initial answer to the Petitioners' Complaint, the allegedly unconstitutional application of that statute was not raised at the trial court by Petitioners; nor was it raised by Petitioners in the Tennessee Court of Appeals when that Court of Appeals reversed and dismissed the judgment rendered in favor of Petitioners in the trial court. That dismissal was based upon the applicability of the same statute of limitations, T.C.A. §28-304. See appendix to Petition, at p. A-17 *et seq.* As is pointed out in Petitioners' Petition at page 5, Petitioners did for the first time specifically attempt to raise in written briefs and argument filed with the Supreme Court of Tennessee the constitutional question they here seek to have this Court review. That constitutional question, however, was not properly raised before the Supreme Court of Tennessee because Petitioners did not comply with Tennessee Code Annotated §29-14-107(b), which provides:

> In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance, or franchise is of state wide effect *and is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard.* (Emphasis supplied.)

Further, Tennessee Rules of Civil Procedure Rule 24.04 provides:

> *Notice To Attorney General When Statute, Rule or Regulation Is Questioned.* When the validity of a statute of this State or an administrative rule or regulation of this State is drawn in question in any

> action to which the State or an officer or agency is not a party, the Court shall require that notice be given the attorney general, specifying the pertinent statute, rule or regulation.

Further, Tennessee Rules of Appellate Procedure Rule 32(a) provides:

> *Service; When Required.* When the validity of a statute of this state or an administrative rule or regulation of this state is drawn in question in any appeal to which the state or an office or agency is not a party, the party raising such question shall serve a copy of his brief on the Attorney General.

The record is devoid of any such notice, and counsel for Respondents does not recall any being given.

This notice provision is held to be mandatory, the object of the requirement being to protect the public should the parties be indifferent to the result, as it might affect the public welfare. *Cummings v. Shipp*, 156 Tenn. 595, 3 S.W.2d 1062 (1928).

The Supreme Court of the United States has consistently held that constitutional questions involving the validity of state laws cannot be raised for the first time upon a writ of certiorari. 28 U.S.C. §1257. *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969).

Thus, Petitioners' contention that "the Tennessee Supreme Court has therefore repeatedly been confronted with this federal constitutional question" ignores the requirement of notice to the attorney general. Failure to comply with this mandatory provision is a jurisdictional error which prohibits the constitutional question from being considered by the Tennessee Supreme Court. *Cummings v. Shipp, supra.* Petitioners' contention is therefore not supported by Tennessee statutory and decisional law.

This Court has specifically held that 28 U.S.C. §1257 "vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below". *Cardinale v. Louisiana, supra.* If it does not appear upon the record that the federal question was both raised and decided in the state court below, the appellate jurisdiction fails. *Cardinale v. Louisiana, supra.*

See also, Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969):

> Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary.
>
> 394 U.S. at 582, 89 S.Ct. at 1360.

The burden therefore of demonstrating that the equal protection issue attempted to be raised in this Petition for a Writ of Certiorari was properly raised before the Tennessee Supreme Court rests with the Petitioners. Your Respondent respectfully asserts that the issue was not properly raised in the State Courts of Tennessee; and that therefore this Honorable Court is without jurisdiction to hear this case. Nowhere in either the original opinion of the Supreme Court of Tennessee nor in its opinion on Petition to Rehear does that Court indicate that it has reviewed and passed upon the constitutional question.

It is therefore respectfully submitted that there is an absence in the record of a showing "that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari." Rules of the Supreme Court of the United States, Rule 21.1(h).

II. The Issues Raised In This Petition For A Writ Of Certiorari Do Not Constitute An Important Question Of Federal Law Which Should Be Settled By This Court.

One of the considerations governing review on certiorari is a finding that a state court has decided an *important question of federal law* that has not been but should be settled by the United States Supreme Court. See Rules of the Supreme Court of the United States, Rule 17.1(c). This Petition for a Writ of Certiorari does not raise such a question.

This Honorable Court has on at least two previous occasions dismissed appeals from state courts as not presenting a substantial federal question where the state courts have upheld the constitutionality of legislation which created statutes of limitations of a shorter period of time for particular professions or trades than statutes of limitations applicable to non-members of those professions and trades.

In *Carter v. Hartenstein*, 248 Ark.1172, 455 S.W.2d 918 (1970), plaintiff contended that the four-year statute of limitations applicable to those engaged in the designing, planning, supervising or observing construction or construction and repair of an improvement to real estate violated the 14th Amendment to the United States Constitution, was discriminatory, was applied in violation of the equal protection of the laws, and constituted special legislation. The Supreme Court of Arkansas upheld the constitutionality of this specialized statute of limitations, and this Honorable Court dismissed the appeal "for want of a substantial federal question." *Carter v. Hartenstein*, 401 U.S. 901, 91 S.Ct. 868, 27 L.Ed.2d 800 (1971).

Likewise, in *Woodward v. Burham City Hospital*, 79 Ill.2d 295, 402 N.E.2d 560 (1979), the Illinois two-year statute of limitations for suits against physicians and hospitals based on medical malpractice was upheld by the Illinois Supreme Court against attacks based upon the due process and equal protection clauses of the United States Constitution as well as other attacks which raised questions identical to those raised by Petitioners in this cause. Once again, this Court held that the attempted appeal by those contending that the two-year statute of limitations applicable to a particular class of professionals was violative of the equal protection clause did not raise a substantial federal question. *Woodward v. Burham City Hospital*, 449 U.S. 807, 101 S.Ct. 54, 66 L.Ed.2d 11 (1980).

Since this Court has previously held that the identical issues raised by Petitioners in this cause do not involve substantial federal questions, it is respectfully submitted that the Petition in this cause should be denied as not raising "an important question of federal law which has not been but should be settled by this Court."

CONCLUSION

The record in this cause fails to support Petitioners' contention that the constitutional question has been properly raised before any state court which heard the issues in this cause. This failure precludes Petitioners' raising it at this level and obviates jurisdiction to grant the Writ of Certiorari.

Further, prior decisions by this Court have indicated that the question raised in this Petition does not constitute a substantial federal question, thus eliminating the only real consideration set out in Rule 17 of this Court's

rules for considering the granting of certiorari in this cause.

For both of those reasons, it is respectfully submitted that the Writ of Certiorari should be denied.

Respectfully submitted,

LEO BEARMAN, JR.
2000 First Tennessee Building
Memphis, Tennessee 38103
(901) 526-2000
Attorney for Respondents

CERTIFICATE OF SERVICE

I certify that I have forwarded the required number of printed copies of this Response to the Clerk of the United States Supreme Court and to counsel For Petitioners: Frank B. Bird, P.O. Box 647, Maryville, Tennessee 37803-0647, and H. Morris Denton, P.O. Box 306, Bolivar, Tennessee 38008 all on this 1st day of November, 1984.

Leo Bearman, Jr.

LEO BEARMAN, JR.